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IN THE

Supreme Court of the United States

October Term, 1970

No.

RUGGERIO BOIARDO,

Petitioner,

v.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, APPELLATE DIVISION

Petitioner, Ruggerio Boiardo, prays that a writ of certiorari be issued to review the judgment of the Superior Court of the State of New Jersey, Appellate Division, affirming a judgment of the Superior Court of the State of New Jersey, Essex County, convicting him of conspiracy to violate the lottery statutes of the State of New Jersey (N.J.S. 2A: 85-1, 121-3 and 112-3).

Opinion Below

The opinion of the Superior Court of the State of New Jersey, Appellate Division, not yet officially reported, is reprinted herein as an Appendix.

Jurisdiction

The judgment of the Superior Court of the State of New Jersey, Appellate Division, was entered on July 30, 1970. Certification of the case was denied by the Supreme Court of New Jersey on September 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether petitioner's right to due process of law and his right to confront the witnesses against him were violated by the introduction against him of statements allegedly made by two non-testifying co-defendants, those statements describing him not only as the leader of the conspiracy but also as a person guilty of numerous other crimes.

2. Whether petitioner's right to a fair and impartial jury was violated when, although alternate jurors were available, the trial court permitted the jury which rendered the verdict to include two persons upon whom bribe attempts had been made, after denying counsel the opportunity to question the jurors as to what effect the bribe attempts might have upon their verdict.

3. Whether petitioner's right to trial by jury and his right to confront the witnesses against him were violated when the trial court refused to instruct the jury that it could not use against petitioner declarations of alleged co-conspirators unless and until his participation in the conspiracy had been established by proof independent of those declarations.

Statement of the Case

Petitioner was indicted by a New Jersey grand jury for conspiracy to engage in gambling activities in violation of state lottery statutes.[1] The evidence presented at trial, if believed, was sufficient to prove that the conspiracy existed and that petitioner was a part of it. On April 28, 1969, he was found guilty and, on June 11, 1969, he was sentenced to a term of from two and one-half to three years in New Jersey State Prison and fined $1,000.

As it pertained to petitioner, the principal evidence consisted of the testimony of an Internal Revenue Service Agent named Germano, who had acted in an undercover capacity in winning the confidence of certain co-conspirators at the Brit Thomas Limohousette in Newark, which was the scene of numerous activities connected with the conspiracy. The co-conspirators whose confidence Germano inspired while posing as a small bettor were named Cipriano and Thomas.

During the trial, a number of events occurred which give rise to this petition:

First, Germano was permitted to testify about numerous statements made to him concerning petitioner by Cipriano and Thomas, on the theory that these statements were made in furtherance of the conspiracy. The statements related that petitioner was the "boss" who had the power to get all the bookies together on the odds and from whom other bookies needed permission to operate. Additionally, the trial court permitted Germano to testify that the two co-conspirators had told him that petitioner was the biggest

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[1] See N.J.S.2A:85-1, 121-3 and 112-3.

man in the "rackets" in all of New Jersey and that his word "could get a guy knocked off."

Second, three of the original sixteen jurors hearing the case were approached by outsiders with what those three interpreted as bribe attempts. Those attempts were reported to the trial judge by the jurors, each of whom asserted that he could render a fair verdict despite the attempt. No opportunity to question the jurors involved was given defense counsel, though they requested it. When the time for the selection of the final twelve came, defense counsel requested that the three upon whom the bribe attempts had been made be excused. The trial judge refused the request, stating that he might have granted it had he been convinced that the defendants were not implicated in the bribe attempts. Two of the three jurors involved were among the twelve who rendered the verdict.

Third, the trial judge refused to give a requested charge to the effect that the jury, in determining whether petitioner was a member of the conspiracy, could not consider what other persons may have said or done.

Reasons For Granting The Writ

1. Internal Revenue Service Agent Germano was permitted to testify that while he posed as a casual bettor two co-conspirators made statements to him which described petitioner as the "boss" of the gambling conspiracy. The New Jersey Appellate Division rejected petitioner's argument that these statements were not made in furtherance of the conspiracy by stating:

> The lifeblood of a lottery operation is the regular small bettor, and Germano became such a bettor. We

think it was inferable by a jury that the statements were made to Germano to instill in him confidence in the lottery operation and its business-like efficiency so that he would continue to place his bets with the organization.

It is true that a similar "furtherance" theory has been accepted by other courts, but only when the potential customer of the organization was one whose financial contribution was so large that it could reasonably be inferred that the other conspirators (for whom the declarant ostensibly spoke) would have consented to the making of such statements so calculated to instill confidence in the customer.[2] No case, however, has been found justifying the admission of statements made to one in Germano's position—that of a dollar bettor who filled the conspiracy's coffers with a mere sixty dollars in six months time. To justify their admission in this case is virtually to remove the "furtherance" requirement of the traditional rule, for few lawyers have an imagination so sterile as to be unable to spin out, when pressed to do so, a theory how any given statement furthers any given conspiracy.[3] That requirement, born out of the hearsay rule, should not so lightly be snuffed out. In any event, if it is to become a dead letter, then the death certificate should be signed by this Court and not by the court below.

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[2] See, e.g.: *United States* v. *Campisi*, 248 F.2d 102 (2d Cir. 1957) (customer had given the conspiracy $4,600 worth of business in a single month); *Salazar* v. *United States*, 405 F.2d 74 (9th Cir. 1968) (statements were made to a "big customer" in order to preclude his imminent refusal to purchase a large quantity of heroin).

[3] As an example, one need only refer to the judicial ingenuity which created so many exceptions to and confusion about the "mere evidence" rule of *Gouled* v. *United States*, 255 U.S. 298 (1921). See the reference to those exceptions and that confusion in *Warden* v. *Hayden*, 387 U.S. 294 (1967).

But the statements admitted went far beyond describing petitioner as head of the gambling conspiracy. They included, for example, the allegation that he was the "boss of the eastern seaboard" who had numerous exploits in the "rackets" and whose word "could get a guy knocked off." These statements clearly accused him of other crimes and in no way furthered the conspiracy. The court below, opining that the evidence of guilt was overwhelming, held that "at most the admission of such statements was harmless error." We submit that the interests of justice should prompt this Court to review any holding that it is mere harmless error when a jury is informed that the defendant whose liberty they hold in their hands is a major racketeer capable of snuffing out the life of a fellow human being.

Finally, the admission of these statements violated petitioner's rights under the Confrontation Clause of the Sixth Amendment, for neither Cipriano nor Thomas testified, and thus petitioner was prevented from cross-examining them as to the truthfulness of the statements or, indeed, whether the statements were ever made.

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court held that the admission of a non-testifying co-defendant's confession implicating defendant violated the latter's Sixth Amendment right of confrontation, even though traditionally-accepted limiting instructions had been given by the trial court. The prejudice to petitioner in this case was just as great as it was to Bruton. It is true, of course, that this Court noted that no "recognized exception" to the hearsay rule was involved in the receipt, as against Bruton, of the co-defendant's confession. 391 U.S.

at 128 n. 3. And it is also true that there is a "recognized exception" to the hearsay rule dealing with declarations of co-conspirators. But the *Bruton* case stands for far more than its bare holding. In *Evans* v. *Dutton*, 400 F.2d 826, 830 (5th Cir. 1968), *probable jurisdiction noted*, 393 U.S. 1079 (1969), *appeal pending*, U.S. , 25 L. Ed. 2d 682 (1970), the Fifth Circuit stated, in discussing *Bruton*, that:

> The Supreme Court has now made clear that the rationale of hearsay exceptions in criminal cases must be continually scrutinized and reevaluated. . . . We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of the fact.

We respectfully submit that, in light of *Bruton* and its interpretation by other courts, this Court should seize the present opportunity to re-evaluate the "co-conspirator's declaration" exception to the hearsay rule and to determine in what circumstances it may constitutionally co-exist with the Confrontation Clause. And it is especially important that the reevaluation occur in this case, where the exception has, by the action of the courts below, been stretched far beyond its normal limits—limits which this Court has often stated it will strictly enforce. See, e.g., *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

2. During the trial, attempts were made to bribe three of the sixteen jurors. Each of the three reported the attempt to the trial judge and was questioned by him in open

court[4] as to the effect which the incident would have upon his or her ability to be fair. Each said that he could be fair despite the incident. Defense counsel's request for permission to question the jurors further as to their continued impartiality was denied by the trial court.

At the close of the trial, counsel requested that the three jurors upon whom bribe attempts had been made be excluded from the twelve chosen to deliberate, there being a sufficient number of non-approached jurors to enable a full jury to be selected. The request was refused, and two of the three were included in the twelve. Petitioner was thereby gravely prejudiced.

In *Mattox* v. *United States*, 146 U.S. 140, 150 (1892), this Court stated the general rule that:

> Private communications, possibly prejudicial, between jurors and third persons . . . are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

That the burden of proof on this issue belongs to the prosecution is made clear by *Remmer* v. *United States*, 347 U.S. 227 (1954), which stated that it was a heavy burden which could be met only "after notice to and hearing of the defendant." The requirement of notice was obviously laid down so that counsel could participate in the hearing on the issue of harmlessness or prejudice. Here, however, no such hearing ever took place. The trial court forbade counsel to question the jurors, and would not even ask the jurors

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[4] There was, however, an initial questioning in chambers of each juror involved in the absence of counsel.

pertinent and quite proper questions suggested by counsel.[5] See, e.g., *Gold* v. *United States*, 352 U.S. 985 (1957), where a hearing was held which took almost one hundred pages of the record to report.

In ruling as it did, the court below stated that: "The jurors' responses to the court's questioning indicated affirmatively that the irregularity would not influence the verdict." But that reasoning fails to take account of this Court's requirement that a hearing be held[6]—a hearing at which defense counsel is given the opportunity to participate. That opportunity was denied counsel in the present case, and the Appellate Division's belief that the jurors involved would be fair is based on nothing more than the slender wisp of those jurors' own say-so, never subjected to the test of any pertinent questions, either asked or suggested, by counsel.

The trial court's conduct in permitting the affected jurors to serve among the sworn twelve was doubly improper because it was completely unnecessary; the three who had been approached could have been excused at the end of the case without the necessity of a mistrial. But without any reason born of necessity, the trial court permitted petitioner's fate to be decided by two jurors who, despite their disclaimers, may have harbored ill feelings against him on the theory that he was behind the bribe attempts.[7] No chance was given counsel to show, if they could, that the

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[5] E.g., Whether the bribe offeror had stated that he was acting on behalf of the defendants, and whether the juror had formed any opinion about any defendant because of the bribe attempt.

[6] That requirement was based upon the Constitution, not upon this Court's supervisory powers. It should therefore bind the states as well.

[7] Even if the approached juror might himself be fair, there was a grave danger that he might view with suspicion the vote for acquittal of any fellow juror, believing that it was inspired more by cash than by conscience.

jurors would not be fair. The procedure followed by the trial judge and sanctioned by the court below should be promptly condemned by this Court, lest it be followed elsewhere.

3. Much of the evidence admitted against petitioner consisted of statements allegedly made about him to Agent Germano by Cipriano and Thomas. It was important, therefore, that the jury know that whether petitioner participated in the conspiracy had to be determined on the basis of his own actions, not on the basis of what Cipriano and Thomas may have said about him. The trial judge was requested to give to the jury a charge covering that rule, but refused to do so.[8]

In dealing with this issue, the court below stated that:

> [I]t is necessary for the State to submit proof independent of declarations of alleged co-conspirators of the existence of a conspiracy inclusive of defendant before such declarations are admissable against him. No New Jersey case has heretofore expressly considered the question whether, after the ruling of the trial judge admitting such declarations, the jury is required to reconsider the competency of the declarations, as, in effect, the charge sought by defendant here would require. The question is not free from difficulty. . . .

It concluded, however, that the appropriate rule was the one followed by the Second Circuit in cases such as *United*

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[8] The requested charge read as follows:

> In determining whether or not a defendant was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant in a conspiracy must be established by evidence as to his own acts and conduct, what he himself said or did.

States v. *Stadter*, 336 F.2d 326, 329-30 (2d Cir. 1964)—a rule which does not require that such a charge be given.[9]

But the position of the Second Circuit is neither the final nor the only word on this issue. Other federal courts have taken the opposite view—the view we urge upon the Court.[10] The issue involved is, as will shortly be shown, one of Con-

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[9] See also *United States* v. *Stromberg*, 268 F.2d 256, 266 (2d Cir.), *cert. denied sub nom. Lessa* v. *United States*, 361 U.S. 863 (1959) (the question of whether there is independent proof of a defendant's participation in a conspiracy is "a preliminary question for the *judge* to decide . . .").

[10] See, *e.g.*: *Newman* v. *United States*, 331 F.2d 968, 971 (8th Cir. 1964), *cert. denied*, 379 U.S. 975 (1965) court holds proper trial judge's charge that "membership in a conspiracy must be established by evidence of the defendant's own conduct, what he himself did or said—not what others did or said . . . ."); *Landers* v. *United States*, 304 F.2d 577, 582 (5th Cir. 1962) ("the quoted excerpt of the charge correctly conditions the consideration by the jury of acts and declarations of co-conspirators upon the establishment of the conspiracy and the appellant's connection with it"); *Daley* v. *United States*, 231 F.2d 123 (1st Cir.), *cert. denied*, 351 U.S. 964 (1956) (proper for trial court to charge that the out-of-court statements of various defendants could be used against each defendant whom *the jurors* determined to be a participant in the conspiracy); *United States* v. *Guido*, 161 F.2d 492, 495 n. 3 3d Cir. 1947) (trial court gave charge similar to that requested by petitioner; Third Circuit criticizes it solely on ground that statement was not made in furtherance of the conspiracy); *Schmeller* v. *United States*, 143 F.2d 544, 551 (6th Cir. 1944) ("the court should have charged that testimony as to conversations held not in the presence of one or more of the various appellants and not binding on them in their official capacity were inadmissible against them unless the conspiracy was proved"); *Deacon* v. *United States*, 124 F.2d 352, 360 (1st Cir. 1941) ("abundant" authority said to support correctness of trial court's charge that if jury found defendant to be a conspirator, then certain statements of co-conspirators could be used against him, but, if not, then they must strike such evidence from their minds); *United States* v. *Heffler*, 270 F. Supp. 79, 82 (E.D. Pa. 1967), *aff'd*, 402 F. 2d 924 (3d Cir. 1968), *cert. denied sub nom. Cecchini* v. *United States*, 394 U.S. 946 (1969) (trial court states that evidence of a person's conversation with one conspirator was admissible against the defendant "if the jury found from other evidence that he was part of the conspiracy").

stitutional dimension. The federal courts are, as has already been shown, in conflict upon it. The combination of these two facts is, by itself, a compelling reason for the granting of the writ.

We respectfully submit that the rule for which we contend is the only one consistent with a defendant's constitutional rights to trial by jury and to confront the witnesses against him. The State's theory, accepted by the court below, is that the *judge* may determine whether, from the proof adduced, the jury *could* find that the defendant was a participant in the conspiracy and, if he so determines, may give *all the evidence* to the jurors for their consideration in determining the defendant's guilt or innocence, including the hearsay statements of co-conspirators. Such an approach to this problem involves a violation of both of the constitutional rights we have mentioned.

A defendant charged with participation in a conspiracy is entitled to have a jury determine whether, beyond a reasonable doubt, he was in fact a conspirator. The rule adopted by the court below, however, suffers a defendant to be improperly convicted because of a judge's determination (which need not have been based upon the reasonable doubt test) that he was a conspirator. A defendant is also entitled to confront those witnesses whose testimony may be responsible for his conviction. Yet the rule chosen by the court below would completely deprive a defendant of his right of confrontation and permit a conviction to be based upon the uncross-examined declarations of co-conspirators even in circumstances where the jury would not have branded the defendant a conspirator absent those declarations.

An example can best illustrate this rather complex point. Suppose that a defendant is implicated in a conspiracy by two types of proof—circumstantial evidence that he was a participant in the conspiracy and out-of-court statements of proven conspirators that he was a participant. Suppose further: (1) that the circumstantial evidence was of a nature which any reasonable jury might reject (and the particular jury involved *would* reject) even though a judge might reasonably believe that they might accept it; and (2) that the nature of the co-conspirator's statements was such as to compel a jury to believe, despite the hearsay impediment, that the defendant was in fact a conspirator. Under the rule adopted below, a conviction would be permissible even though the jury would have acquitted if the only proof had been the circumstantial evidence and even though the conviction was based solely upon the jury's acceptance of the uncross-examined statements of the co-conspirators. We submit that such a conviction would be had solely by the sacrifice of the defendant's right to a jury determination as to whether he was a conspirator and of his right to confront those upon whose declarations the verdict depended. This Court should not tolerate such a sacrifice, lest other courts continue to do so.

As the court below noted, the issue involved here is not free from difficulty. Each year, almost every federal district court hears a flock of conspiracy cases. In almost all of those cases the issue now raised appears. Those courts are now in conflict on this very issue. This very issue is now squarely presented to this Court. If we are correct that, at the very least, a serious Constitutional question is involved, then we submit that this Court should consider the issue and lay the matter to rest once and for all.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion

SUPERIOR COURT OF NEW JERSEY

Appellate Division

Docket Nos. A-1899; 1892; 1893; 1894; 1895; 1896; 1897; 1898; 1899; 1925; 1926; 1928; 1929; 1966; 1705; 1860; 1861; 1862-68

State of New Jersey,

Plaintiff-Respondent,

v.

Ruggerio Boiardo, Angelo Seca, Andrew Gerardo, Louis Di Benedetto, Cesar Cerato, Joseph Cipriano, Tony Boyd, Julia Orsi, Benjamin Thomas, Nino Macciola, Carmine Laquori, Nunzio Seca, John Malanga, Thomas Sperduto, Michael Del Guercio, Michael Russomano, Geraldino Custodi, Michael Maironino, and Joseph Sabbecchia,

Defendants-Appellants.

Collester, J. A. D.

This is an appeal by defendants from their convictions, following a jury trial, of violating the lottery laws of this State and for conspiracy. All 19 defendants were convicted under an indictment charging them with conspiracy to operate a lottery and violate the laws pertaining to the business of lottery between August 5, 1966 and February 3, 1967 in Newark, Bloomfield, Belleville, East Orange and North Arlington, contrary to the provisions of *N.J.S.A.*

2A:98-1. In addition thereto, 12 of the 19 were convicted on one or more indictments charging them with violations of either *N.J.S.A.* 2A:112-3 (keeping a place to which persons might resort for gambling in any form) or *N.J.S.A.* 2A:121-3 (possession of lottery paraphernalia), or both. All of the indictments were consolidated for the purpose of trial.

The evidence presented by the State clearly established that during the period referred to in the conspiracy indictment defendants were engaged in a massive lottery business. The operation terminated on February 2 and 3, 1967 when special agents of the Intelligence Division of the Internal Revenue Service conducted a series of raids at places used as lottery "offices" or meeting places of the conspirators.

At the trial federal agents testified to the activities of defendants during the many weeks they were under surveillance. The testimony revealed that some of the defendants would pick up paper bags (allegedly containing lottery slips and money received from bettors) daily, at various locations or "drops," and take them to one of several lottery offices used in the operation. The bags often were transferred from one car to another, and the cars would be driven over circuitous routes to avoid detection before the betting records and money were delivered to the lottery office.

The agents also testified of their surveillance of some of the defendants in the vicinity of the Ben Thomas Luncheonette and the Altruist Club, both located in Newark, which served as bases of operation and meeting places for the conspirators. The State presented testimony of the

details of the raids conducted by the federal officers and introduced in evidence the lottery paraphernalia seized, including lottery slips, numerous adding machines, pads, envelopes, coin wrappers, "cut cards," and cash.

Federal agent Dominic Germano served as an undercover agent during the six-month period before the raids and arrests ended the lottery operation. Pretending to be a waiter employed at a Catskill Mountain resort, he became an habitué of the Ben Thomas Luncheonette, a favorite meeting place for several of the conspirators, which was operated by the defendant Thomas. He testified that he visited the luncheonette on 68 days, often placed bets with defendant Cipriano, and gradually worked his way into the confidence of both Cipriano and Thomas. During his visits he overheard conversations between several of the defendants that referred to the lottery operation. On 42 days he saw defendant Ruggerio Boiardo meet with defendants Andrew Gerardo, Toby Boyd, Angelo Sica, Louis DiBenedetto and others unknown to him, singly or in groups, inside the luncheonette or in the immediate vicinity thereof. On various occasions he witnessed wrapped packages, inferentially containing money, being passed directly to Boiardo or being placed in Boiardo's car by one of the defendants. Agent Germano often drove Cipriano to a service station in Newark which Cipriano used as a base of operation for his lottery book. He said that after he became well known to Thomas and Cipriano they disclosed details of the organized lottery business which was being conducted.

Thomas told Germano that "Boiardo was the boss of the eastern seaboard and that nobody makes a move without

his approval," and that Gerardo, DiBenedetto, Angelo Sica and a man named Farina were his lieutenants. Cipriano was more talkative. He too said Boiardo was the "chief" or "boss," and was "the biggest man in the rackets in New Jersey and controls all New Jersey [and] part of New York." He described the organization as being made up of "soldiers, lieutenants and captains" headed by Boiardo; that it had over 400 runners plus pickup men and controllers. He said the "chain of command" was Boiardo, Farina, Gerardo and Boyd, in that order; that Gerardo controlled all the lottery offices and prepared the envelopes for money to be paid out for "hits" (successful plays); that Boyd ran one of the lottery offices; and that DiBenedetto was active in the organization. Cipriano further told Germano that Angelo Sica operated his own book and had over 20 men working for him, was more or less independent but needed Boiardo's permission to operate, and probably paid for the privilege. He also said the "chief" had the power to "get all books together on odds and cut numbers" and insisted that all "hits" be paid off promptly.

None of the defendants testified at the trial or called witnesses in their defense. All defendants except Nunzio Sica and Cesar Cerato concede on this appeal that the evidence presented by the State was sufficient, if believed to establish the fact that during the period covered by the indictment a conspiracy to operate a lottery and to violate *N.J.S.A.* 2A:121-3 and *N.J.S.A.* 2A:112-3 existed. Moreover, all of the defendants with the exception of Nunzio Sica, Joseph Sarrecchia and Benjamin Thomas, who were convicted of one or more of the indictments charging them with violations of the substantive crimes, *viz.*, *N.J.S.A.* 2A:112-3

and *N.J.S.A.* 2A:121-3, concede on this appeal that there was sufficient evidence as a result of the searches and seizures which followed the raids and arrests on February 2, 1967 to establish their guilt of the crimes charged.

The Appeal of Ruggerio Boiardo

Although Boiardo concedes the State's proofs established that a conspiracy existed he asserts the evidence did not show that he was a part of it. He raises seven points in his brief as grounds for a reversal of his conviction.

Point I

Boiardo first contends that the trial court erred in permitting Germano to testify as to statements made to him by Thomas and Cipriano concerning Boiardo's connection with the conspiracy. The statements were admitted by the court under the traditional hearsay exception for statements made in furtherance of the conspiracy. *Evidence Rule* 63(9)(b). The rule provides:

> A statement which would be admissible if made by the declarant at the hearing is admissible against a party if * * * (b) at the time the statement was made the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan.

Boiardo asserts that the admission of such testimony constituted reversible error because (A) it violated his Sixth Amendment right to be confronted with witnesses against him, (B) there was no independent proof that he was a member of the conspiracy, and (C) the statements were not made in furtherance of the conspiracy.

Opinion

A.

Defendant argues that his constitutional right of confrontation was violated because Thomas and Cipriano elected not to take the stand and testify in their own defense and he therefore was unable to cross-examine them as to the truth of such statements. He relies on *Bruton* v. *United States*, 391 *U.S.* 123 (1968), and *Evans* v. *Dutton*, 400 *F.* 2d 826 (5 Cir. 1968), probable jurisdiction noted, 393 *U.S.* 1079 (1969), appeal pending *U.S.* , 25 *L. ed.* 682 (1970). *Bruton* does not support Boiardo's position. The court there stated that no recognized exception to the hearsay rule was involved in that case and said, "We intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 *U.S.* 128, n. 3. *Evans* v. *Dutton* is inapposite on its facts because it involved the admission of a hearsay declaration of a coconspirator made more than a year after the crime was committed. 400 *F.* 2d at 831.

Boiardo would have us equate the right of confrontation with the opportunity for cross-examination. To adopt such a rigid formula would altogether eliminate the use of much hearsay evidence permitted in criminal trials at a time when the judicial trend has been toward a salutary liberalization of hearsay exceptions.

Hearsay exceptions that dispense altogether with the opportunity for cross-examination have long been accepted and utilized in criminal trials without unduly compromising the accused's ability to present a defense. See *Mattox* v. *United States*, 146 *U.S.* 140 (1892) and *State* v. *O'Leary*, 25 *N.J.* 104, 113 (1957) (dying declarations); *State* v. *Reddick*, 53 *N.J.* 66, 68 (1968) (business records). Moreover,

the particular hearsay exception challenged here has been considered by the United States Supreme Court and our State courts without having been found constitutionally infirm. *Lutwak* v. *United States*, 344 *U.S.* 604, 617-619 (1953); *State* v. *Carbone*, 10 *N.J.* 329, 340 (1952); *State* v. *Yedwab*, 43 *N.J. Super.* 367 (App. Div. 1957), certif. den. 23 *N.J.* 550 (1957); *State* v. *Cavanna*, 70 *N.J. Super.* 176 (App. Div. 1961), certif. den. 36 *N.J.* 298 (1962). We cannot be unmindful of this history of judicial approval. *Cf. California* v. *Green*, *U.S.* , decided June 23, 1970.

There being no authoritative decision requiring us to find that the Confrontation Clause invalidates our *Evidence Rule* 63(9)(b), we decline to so hold. We conclude that the introduction in evidence of hearsay statements made by the co-defendants in furtherance of a conspiracy in which Boiardo was a participant did not violate his Sixth Amendment right to be confronted by witnesses against him.

B.

Boiardo's contention that there was no evidence, independent of the co-conspirators' statements to Germano, which showed that he participated in the conspiracy, is totally without merit. The evidence clearly indicated that the Ben Thomas Luncheonette was a base of operation for the conspirators. Lottery bets were taken there daily by some of the defendants between 9 and 11 A.M. Boiardo was a regular visitor during those hours where he met and spoke with Boyd, DiBenedetto, Gerardo, Angelo Sica, Cerato, and others. He was often referred to by the conspirators as the "boss." Boyd, undisputably a key figure in the conspiracy, often drove to Boiardo's home in Livingston between 8 and

8:30 A.M. On one occasion Germano heard Boiardo tell Boyd to pick him up at his home at 8 A.M. the following morning. On another occasion Boyd told Boiardo, "I finish my run at 5:30." He also heard Boiardo direct Cipriano to make a telephone call for him, and Gerardo inform Boiardo, "They're going to give you the raid treatment • • • the heat is on."

On a number of occasions Germano observed conspirators hand Boiardo slips of papers although Germano was unable to see what they contained. On approximately 20 separate days conspirators placed bags, boxes, and packages in Boiardo's automobile. While Germano and other agents who had the luncheonette under surveillance were unable to determine the contents thereof they were of the type generally found in a lottery operation. When Boiardo was arrested on February 3, 1967 while driving away from the luncheonette a search of his person produced a paper bag from one of his pockets which contained six packets of money, wrapped separately, totaling $2,036. The paper bag was similar in size and shape to one which had been placed in his car earlier that day by one of the conspirators. In another of Boiardo's pockets the agents found a roll of bills wrapped in a rubber band containing $478.

The existence of a conspiracy and a defendant's participation in it must be shown by "proof aliunde" before statements made by co-conspirators out of his presence are admissible against him. *Glasser* v. *United States*, 315 *U.S.* 60, 74-75 (1942); *United States* v. *Plata*, 361 *F. 2d* 958, 961 (7 Cir. 1966), *cert.* denied, 385 *U.S.* 841 (1966). We are satisfied that the evidence adduced by the State in this case, excluding the damaging declarations of Thomas and Cipri-

ano, was sufficient to prove that Boiardo was not only a participant in but the leader of the conspiracy.

C.

Boiardo's argument that the statements made by Cipriano and Thomas to Germano were inadmissible because they were not made in furtherance of the conspiracy is also without merit. The basis of his argument is that Germano was a stranger to the conspiracy and not considered by either Cipriano or Thomas as one who might be of help to it, that neither conspirator could have thought that his declarations to Germano advanced the goals of the conspiracy, and that at best their statements were merely gossip. We do not agree.

The life blood of a lottery operation is the regular small bettor, and Germano became such a bettor. We think it was inferable by a jury that the statements were made to Germano to instill in him confidence in the lottery operation and its business-like efficiency so that he would continue to place his bets with the organization. He was told that there was a "chain of command," that the organization "pays off hits right away, and this is what the chief wants and demands," that "the chief had the power to get all the books together on odds and cut numbers," that independents "can't operate without the chief's approval," and that Boiardo "controls all of New Jersey, part of New York."

The trial court did not err in its conclusion that there was a fact issue as to whether statements by Cipriano and Thomas were made in furtherance of the conspiracy.

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Point II

Boiardo contends that the admission of the hearsay statements discussed in Point I, above, deprived him of his right to a fair trial because they indicated he was a man of bad character who was engaged in other criminal activities. He alleges that they did more than portray him as the prime mover of the conspiracy because they depicted him as the "boss of the eastern seaboard," the "big boy" in the "oragnization," one who had numerous "exploits in the rackets," the biggest man in the rackets in this State controlling not only all of New Jersey but parts of New York as well, and that he was a man "whose word could get a guy knocked off." He argues that such refrences to his character were irrelevant and so grossly prejudicial as to compel a reversal.

Evidence of other offenses, wholly independent of the one charged, is generally inadmissible. However, here the statements were evidence of Boiardo's position *in the conspiracy for which he was being tried* and indicated the power that he wielded therein. It was permissible for the State to show that Boiardo was the leader of the conspiracy, that he controlled the "rackets," including lottery, and that the conspiracy involved an organization made up of "soldiers, lieutenants and captains" headed by this defendant. Such was the very structure of the conspiracy.

While it may be arguable that some of the references to this defendant were unduly damaging to him as against their weight in evidencing the conspiracy, we do not consider them sufficiently prejudicial to warrant a reversal because the record fairly shrieks of defendant's guilt. A defendant is entitled to a fair trial but not a perfect one.

At most the admission of such statements was harmless error. See *Lutwak* v. *United States, supra,* at 619.

Point III

Boiardo argues that his motion for a judgment of acquittal should have been granted by the trial court. He concedes that this argument can prevail only if we agree with his contention, urged in Point I, above, that there was no independent evidence of his participation in the conspiracy other than the challenged statements of Thomas and Cipriano. Since we have concluded that there was sufficient independent proof of Boiardo's participation in the conspiracy, it follows that the motion for a judgment of acquittal was properly denied.

Point IV

Under this point Boiardo asserts that the trial court erred in denying his motion for a severance since the joint trial with the other defendants made it impossible for him to call co-defendants Thomas and Cipriano as witnesses. He argues that his motion should have been granted because (1) the statements of Thomas and Cipriano testified to by Germano were inadmissible and a severance was essential to avoid his being prejudiced thereby, and (2) the rights of these co-defendants to remain silent and not testify prevented him from cross-examining them as to the truth of their statements. As to the premise of (1) we have held to the contrary above.

The issue here raised was considered and decided adversely to Boiardo's contention in *State* v. *Manney*, 26 *N.J.* 362 (1968), where the court said:

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> [T]here is a division of authority elsewhere on the question whether a severance should be ordered if one defendant plans to call another as his witness. * * * Although a defendant is a competent witness, yet if called by a co-defendant at the latter's separate trial, he could decline to risk incrimination. It is difficult to conceive of a situation in which an accused would be willing to testify at such separate trial but not at a joint one. * * * We hesitate to say that in no situation will a separate trial be ordered, but surely the case would be a rare one. At any rate, there is nothing before us to suggest that either defendant takes the unlikely position that he will testify only upon a separate trial of the other. (at *p.* 369)

The cases cited by this defendant are not to the contrary. They contemplate a severance where evidence against one defendant implicates, *but is not admissible against*, a co-defendant. Such is not the situation here. Moreover, there is no indication in the record that Thomas and Cipriano would be willing to testify at a separate trial of Boiardo without declining to risk self-incrimination. We find no mistaken exercise of discretion in the trial court's denial of the motion for a severance.

POINT V

Defendant claims his right to be tried by an impartial jury was violated when the trial judge permitted two jurors upon whom bribe attempts had been made to remain on the jury. During the course of this six-week trial three of the 16 jurors impaneled to hear the case were approached by persons in attempts to influence their verdict. In each instance the juror immediately reported the incident to the

judge who questioned each juror *in camera* and instructed him not to mention the matter to other jurors. In each case a hearing was conducted in open court, out of the presence of the other members of the jury, during which the juror related what had happened. In response to questions propounded by the judge each juror said that he could still sit on the jury and render a fair decision based on the law and evidence in the case. Defense counsel moved for a mistrial which was denied. After the charge to the jury and before 12 jurors were chosen to decide the case defense counsel moved to exclude the three jurors who had been approached. The motion was denied, and two of the three jurors were selected to serve on the 12-member jury which thereafter deliberated and rendered the verdict.

Defendant contends that the trial judge failed to make a sufficient inquiry as to the impartiality of the three jurors and erred in refusing to exclude the jurors from the final jury of 12.

We are satisfied that the procedure followed by the trial judge was proper and that the defendants' right to a fair and impartial trial was fully protected. The jurors' responses to the court's questioning indicated affirmatively that the irregularity would not influence the verdict. See *State* v. *Sachs*, 69 *N.J. Super.* 566, 588 (App. Div. 1961). We conclude that the court's refusal to grant a mistrial or to remove the three jurors in question from the panel was not an erroneous exercise of discretion.

Opinion

POINT VI

Boiardo argues that the court below erred in refusing to give a requested charge regarding evidence essential to proof of a conspiracy. The requested charge provided:

> In determining whether or not a defendant was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant in a conspiracy must be established by evidence as to his own acts and conduct, what he himself said or did.

The trial court did charge, in effect, that the declarations of any defendant could be considered against the others provided the jury found the conspiracy existed and they were all parties to it. This, we think, sufficiently implied that the jury should find the proviso to be a fact apart from the declarations before considering such declarations as evidential (assuming that as a matter of law the jury is required to make such a finding). It could therefore be fairly deemed that the intent of the requested charge was included in the court's charge to the jury.

In any event, as seen above, under Point I-B, it is necessary for the State to submit proof independent of declarations of alleged co-conspirators of the existence of a conspiracy inclusive of defendant before such declarations are admissible against him. No New Jersey case has heretofore expressly considered the question whether, after the ruling of the trial judge admitting such declarations, the jury is required to reconsider the competency of the declarations, as, in effect, the charge sought by defendant here would require. The question is not free from difficulty. Consider

Evidence Rule 8(1) and (2), dealing with the functions of judge and jury where admissibility of evidence is dependent on a condition of fact, in the light of *Evidence Rule* 63(9) which deals with admissibility of declarations of co-conspirators. See also the extended dictum on the point by Judge Learned Hand in *United States* v. *Dennis*, 183 *F. 2d* 201, 230-31 (2 Cir. 1950).

We conclude that the sound and practical rule to be followed in relation to this particular problem is that adopted by the United States Second Circuit Court of Appeals. *United States* v. *Stadter*, 336 *F. 2d* 326, 329-30 (1964); *United States* v. *Stromberg*, 268 *F. 2d* 256, 265-66 (1959); and see *United States* v. *Corallo*, 413 *F. 2d* 1306, 1324-27 (2 Cir. 1969).

The necessary preliminary findings, clearly justified by the proofs, having implicitly been made by the trial judge here, the denial of the charge sought by defendant was not error.

Point VII

Finally, this defendant contends that the indictment should have been dismissed since his privilege against self-incrimination was violated when the federal agents were permitted to testify as to the results of their investigation of his alleged violations of the federal wagering tax laws or, in the alternative, that the evidence so obtained should have been suppressed.

The point is clearly without merit. Our Supreme Court specifically considered the issues raised and decided them adversely to the defendant's position in *State* v. *Gerardo, et al.*, 53 *N.J.* 261 (1969) .

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THE APPEALS OF ANDREW GERARDO, TOBY BOYD, LOUIS DI BENEDETTO, JOSEPH CIPRIANO, JOSEPH SARRECCHIA AND ANGELO SICA

POINT I

The defendants repeat the same grounds urged for reversal in Points I-VII of the brief submitted by Ruggerio Boiardo which we have fully discusstd above.

POINT II

Defendants Gerardo, DiBenedetto, Sarrechia and Angelo Sica allege that the court erred in denying their motions for a judgment of acquittal at the close of the case. They argue that if Germano's testimony about the statements made by Cipriano and Thomas is inadmissible the remaining evidence against them was insufficient to withstand their motions for acquittal. We have concluded that such testimony was admissible. (See Point I, Boiardo's appeal.) Moreover, from our review of the record there was sufficient evidence independent of such testimony to support the trial court's ruling.

POINT III

The defendants urge that we find reversible error in a lengthy hypothetical question propounded by the State to its gambling expert, Agent Siddall. The question is attacked as improper because it permitted the State to summarize its entire case in the presence of the jury and also because the answers invaled the judy's province as the ulitimate finder of facts.

We see no merit in either contention. The hypothetical question was long of necessity. "An expert cannot give an

opinion without considering all the data, facts, and circumstances pertinent to the inquiry being made." *Rempfer* v. *Deerfield Packing Corp.*, 4 *N.J.* 135, 144-145 (1950). Had it been less complete defendants would undoubtedly have objected to it as not embracing all the facts in evidence. See *Evidence Rule* 56(2).

Nor is expert opinion objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact. *Evidence Rule* 56(3). Siddall was not asked his opinion of defendants' guilt, *cf. State* v. *Landeros*, 20 *N.J.* 69, 74 (1955), but was merely asked to characterize various activities based upon facts in evidence and his expertise in lottery operations. Those questions were properly the subject of expert opinion. See *State* v. *Smith*, 21 *N.J.* 326, 334 (1956); *State* v. *Rucker*, 46 *N.J. Super.* 162, 166 (App. Div. 1957); *State* v. *Sachs*, 69 *N.J. Super.* 566 (App. Div. 1961).

Defendants' reliance on *State* v. *Sachs, supra,* and *State* v. *Vigliano*, 50 *N.J.* 51 (1967) is misplaced. In *Sachs* the objectionable opinion concerned the defendants' physical control of football pool slips, a conclusion not dependent on peculiar knowledge or experience. In *Vigliano* the expert admitted that his opinion was "not probable," and thus merely speculative. Here Siddall's testimony cannot be dismissed as mere conjecture.

Point IV

Defendants claim that the trial court erred in commenting favorably on the credibility of Germano as a witness both during summations and in its charge to the jury and thus denied defendants a fair trial.

In his summation to the jury Boiardo's attorney sought to attack Germano as being untrustworthy because he obtained the information to which he testified while serving as an undercover agent. When the prosecutor objected the court said Germano "was doing his job as he was ordered to do and that was part of his job to detect violations of the law." Defendants moved for a mistrial which was denied. In its charge to the jury the court said:

> Now, there was some comment about the propriety of the actions taken by the Federal officers, particularly about the propriety of the action taken by the agent, Germano. I might indicate to you that the actions that he took were lawful actions and under the direction of the authority of his government to become friendly and to learn what he could about this operation. So that you do not have for your consideration the propriety of his action but you do have for your consideration his ability to observe, his ability to recollect, the accuracy with which he observed and recollected, his ability and accuracy of testifying and the truth or accuracy of that with which he testified. That is your domain, but what he was doing was a lawful action and any comment of counsel of the contrary is not to be considered by you as motivating your decision. You only will consider, as I say, the truth or falsity of what he said, not the propriety of the action he took because he was performing his job.

We find no prejudicial error in either the comments of the court during counsel's summation or the charge to the jury. The court clearly left to the jury the issue of Germano's credibility as a witness.

POINT V

Defendants allege the court committed reversible error in its supplemental charge to the jury after the jury had been deliberating for over 18 hours during a period of three days. They argue that the charge was coercive and prejudicial, particularly in mentioning the obligation of a juror to give consideration to the views of his fellows and that a dissenting juror should reconsider whether his position is a reasonable one.

The charge given by the court was in essence the same as that approved in *State* v. *Williams*, 39 *N.J.* 471 (1963), *cert.* den. 374 *U.S.* 855 (1963), which was based on the charge upheld by the United States Supreme Court in *Allen* v. *United States*, 164 *U.S.* 492 (1896). It clearly instructed the jurors that they should not compromise, divide, or yield their personal convictions for the purpose of arriving at an agreement. See *State* v. *Williams*, *supra*, at 484.

There was no error in the supplemental charge. Moreover, the fact that the jury continued its deliberations for two more days after the charge was given bespeaks the absence of any coercion or prejudice.

POINT VI

Lastly, these defendants contend they were denied the effective assistance of counsel because of the trial court's comment to their attorneys, made out of the presence of the jury, that the attorneys were suspect in the jury tampering incidents which had occurred and would be subjected to an investigation at the conclusion of the trial. They argue that the statements were of such a serious nature

as would unnerve counsel and prevent them from rendering effective assistance to the defendants.

We deem the argument to be frivolous. While the court's remarks may be criticized because of the absence of tangible evidence in the record of involvement by defense counsel, we are satisfied that defendants were not prejudiced thereby. All defense counsel were experienced in the trial of criminal cases. The record belies the argument that they were unnerved and thereafter rendered ineffective representation. Indeed, their continued combativeness throughout the trial, following the incident, completely negates the argument.

THE APPEALS OF THOMAS SPERDUTO, JOHN MALANGA, JULIA ORSI, MICHAEL MAIRONINO, CARMINE LIQUORI, MICHAEL DEL GUERCIO, MICHAEL RUSSOMANO, GERALDINO CUSTODI, NINO MACCIOLI AND NUNZIO SICA

These defendants raise the same grounds urged for reversal in Points I, II, V and VI in the Boiardo appeal and Points III-VI referred to above in the appeal of Andrew Gerardo, *et al.*, which we have already discussed.

In addition thereto Nunzio Sica contends the trial court erred in dismissing his motion for a judgment of acquittal of the three indictments charging him with conspiracy, keeping a place to which persons might resort for gambling, and possession of lottery paraphernalia. Although he concedes that the jury could find that the premises in question were being used as an office in which daily lottery bets were being tabulated, he argues that there was insufficient evidence to connect him to the lottery operation. We disagree.

The testimony by federal agents revealed that on numerous occasions several of the defendants were seen entering and leaving a one-family house at 15 Pershing Place in North Arlington carrying paper bags. A raid on the premises was conducted on February 2, 1969, and numerous items described as lottery paraphernalia were seized. Agent Anthracite testified that when he arrived on the premises he met Mrs. Pearl Gladys Sica, "who described herself to me as the owner of the residence and the wife of Nunzio Sica." See *Evidence Rule* 63(4)(b).

We think that from the declarations of marital status and ownership made by Mrs. Sica the jury could reasonably infer that Nunzio Sica had possession and control of the premises and of the contraband seized therein, *State* v. *Puryear*, 94 *N.J. Super.* 125, 132 (App. Div. 1967), rev'd. on other grounds, 52 *N.J.* 81 (1968), and that he must have known and approved of the lottery activities regularly conducted there. Consequently there was no error in the court's refusal to grant Nunzio Sica's motions for a judgment of acquittal.

We also see no merit to Nunzio Sica's contention that the prosecutor in summation unfairly attempted to link him to Angelo Sica and Louis DiBenedetto through a reference to their common defense counsel. It is apparent that the prosecutor was simply identifying the defendants for the benefit of the jury. The remark was not prejudicial.

THE APPEAL OF CESAR CERATO

POINT I

This defendant also relies on Points I, IV, V, VI and VII urged for a reversal in Boiardo's appeal which we have already discussed in this opinion.

POINT II

He also contends that his motion for a judgment of acquittal should have been granted because there was insufficient evidence that he was a party to the conspiracy and, further, that the verdict of the jury was contrary to the weight of the evidence.

The undisputed evidence shows that on ten separate occasions between November 14, 1966 and January 30, 1967 Cerato was present in the Ben Thomas Luncheonette in the company of other conspirators. On one occasion he was observed giving Toby Boyd a sum of money. Germano himself placed a lottery bet with Cerato, and saw Thomas place bets with him.

Defendant attempts to exculpate himself by claiming the evidence showed that he was not involved in the Newark conspiracy but was a member of a "Jersey City outfit," a "renegade" who did not work for the Newark organization. However, as stated above, it is undisputed that he took lottery bets at the luncheonette, that he needed Boiardo's permission to operate, and that Boiardo "gets a percentage of this action."

We are satisfied that the evidence and the logical inferences to be drawn therefrom required a denial of his motion for acquittal and that there was sufficient proof for the jury to find that Cerato conspired with the other defendants to violate the lottery laws of this State.

THE APPEAL OF BENJAMIN THOMAS

Thomas contends there was erroneous exercise of discretion when the trial court refused to grant a severance

following his hospitalization at the outset of the trial. We agree and reverse his conviction.

During the jury selection process Thomas collapsed and was taken by ambulance to a Newark hospital. The trial court was informed of his illness and hospitalization but refused to grant a severance or continuance. Thereafter Thomas' counsel called Dr. Frederick Cohen, who testified that Thomas was very ill from a urinary infection, that he may have had a heart attack, and that he could not safely attend the trial for at least four weeks. The State admitted that it had no evidence to counter the testimony of Dr. Cohen, and it offered the medical report and affidavit of Dr. Martin Jassie, who had examined Thomas at the State's request. While doubting that Thomas had suffered a heart attack, Dr. Jessie concluded that "Mr. Thomas is currently too ill to stand trial, * * *" and that "postponement of his trial is necessary and it may easily require a month or more." The trial court still refused to grant a severance, ruling that Thomas' absence was voluntary and that his trial would continue without him. Thomas remained absent throughout the trial, appearing only on one occasion at the end of the case following a court order threatening bail forfeiture.

The granting of a continuance for health reasons is a matter ordinarily within the discretion of the trial court. *State* v. *Kaiser*, 74 *N.J. Super.* 257, 271 (App. Div. 1962), certif. den. 38 *N.J.* 310 (1962), *cert.* den. 376 *U.S.* 950 (1963). Among the factors to be evaluated by the court in the exercise of its discretion are (1) medical reports, (2) personal observations of the accused, (3) the effect of a continuance upon the State's ability to present evidence,

and (4) whether or not the accused will be better able to stand trial at a later date. *Id.* The trial court must always be mindful of the accused's constitutional right to be present in the court room at every stage of his trial. See *Illinois* v. *Allen*, *U.S.* , 25 *L. ed. 2d* 353 (1970).

Here there was uncontroverted expert medical opinion that Thomas was too ill to stand trial. Clearly his absence could not be considered voluntary. Moreover, there was no reason to believe that he would not subsequently be available for trial; nor was there any indication that a delay in his trial would be prejudicial to the State in producing evidence. We conclude that the trial court's refusal to grant Thomas' motion for a severance was a mistaken exercise of its discretion.

Conclusion

For the reasons expressed above the convictions of all defendants, with the exception of Benjamin Thomas, are affirmed. The conviction of Thomas is reversed, and his case is remanded for a new trial.

SUPREME COURT OF NEW JERSEY
C-82 September Term 1970

State of New Jersey,
Plaintiff-Respondent,

vs.

Ruggerio Boiardo, et als.,
Defendants-Petitioners.

On Petition for Certification

A TRUE COPY
CLERK

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 24th day of September, 1970.

Clerk of the Supreme Court